Tri-County Transportation, Inc. *and* Lillian Dick *and* Ivan Dick *and* John Croskey. Cases 7–CA–40201(1), 7–CA–40201(2), and 7–CA–40201(3)

August 25, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On March 16, 1999, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge and orders that the Respondent, Tri-County Transportation, Inc., Cadillac, Michigan, its officers, agents, successors, and assigns shall take the action set forth in the Order.

Linda Rabin Hammell, Esq., for the General Counsel.
Michael Figliomeni, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This case was tried before me in Cadillac, Michigan, on June 25 and 26, 1998. The charges were filed by Lillian and Ivan Dick and John Croskey on September 10, 1997,[1] and a consolidated complaint issued on November 25.

The complaint alleges that the above-named individuals (all employees of Respondent Tri-County) were discriminatorily placed on indefinite layoff status in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). Also alleged as an independent violation of Section 8(a)(1) is a rule threatening employees with termination if they contact Tri-County's board of directors about "a work related issue."

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Tri-County, I make the following

FINDINGS OF FACT

I. JURISDICTION

Tri-County, a nonprofit corporation, with facilities in Cadillac, Michigan, transports handicapped students to and from intermediate schools within a 50-mile radius of Cadillac. It annually receives gross revenues in excess of $250,000 and purchases goods valued in excess of $50,000 from a supplier who received them directly from sources outside the State of Michigan. It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since its inception in 1960, Tri-County has been the sole provider of transportation service to a multicounty State entity—the "Intermediate School District" (ISD)—responsible for providing special education instruction and services to handicapped children. It has done so pursuant to a succession of one-page annual contracts under which it is compensated on an average cost-per-mile basis with the rate being recalculated each month.

A board of directors oversees the operations of Tri-County. At all pertinent times, members of the board were: two retired ISD officials (Ron Hellenga and Darryl Petterson) and a local accountant (William Cowen). The latter provides a complete range of accounting services to Tri-County, including preparation of payrolls, tax reports, and cost assessments. He also handles correspondence with governmental bodies, such as the Michigan Employment Security Commission (MESC).

During the 1996–1997 school year, Tri-County employed six busdrivers in servicing six routes, and an aide rode with them on each trip. In addition, it maintained a pool of about 12 substitutes. Typically drivers and aides are retired from other jobs and many are married couples. The Charging Parties fit the pattern. Croskey, a retired state trooper, began driving for Tri-County in 1992. Ivan Dick was a tractor-trailer driver for 26 years and he was hired as a busdriver by Tri-County in 1983. His wife Lillian, an aide in a nursing home for over 10 years, became a full-time aide for Tri-County in 1991.

Short-term layoffs during summer months are customary and the Charging Parties were among those selected for laid off at the end of the 1996–1997 school year. They were informed on Friday, June 6, when they found in their pay envelopes identical letters reading as follows:

May 28, 1997

> Unless you are specifically notified to the contrary, this letter is to provide you *with reasonable assurance of your continued employment in a similar capacity with . . . [Tri-County]*, following the period between two academic years, which commences at the end of classes for the 1996–1997 school year and ends with the resumption of classes for the 1997/1998 school year. This letter is being sent in order to comply with the present unemployment laws. [Emphasis added.]
>
> We would like to thank you for your services to Tri-County . . . and wish you a healthy a you again during the coming school year.[2]

Tri-County unsuccessfully opposed awards of unemployment compensation to Croskey for each of the three preceding summers and the underscored language, taken from the pertinent Michigan statute (MCL 421.27(l)(2)), was intended to preclude further awards.

[1] In agreeing with the judge that the Respondent violated Sec. 8(a)(1) by, among other things, effectively terminating Lillian Dick, Ivan Dick, and John Croskey because they engaged in protected concerted activity when filing unemployment compensation claims, Member Hurtgen notes that the Respondent concedes that it knew that these employees were acting together when they pursued those claims.

[1] All dates are in 1997 unless otherwise indicated.

[2] The letter went out over the name of a Tri-County driver (Herm Liedeke) who earlier in the school year had accepted the extra duty of maintaining schedules and otherwise supervising operations. Shortly after signing the letter he relinquished the extra duties but continued as a driver.

Croskey had discussed unemployment compensation opportunities with fellow employees on numerous occasions over a 2-year period; and before leaving work on June 6, he urged Lillian and Ivan to file claims. By prearrangement over the weekend, they met at the unemployment office at 10 a.m. on Monday, June 9, where, after helping each other complete application forms, they each filed for unemployment compensation. Later that day the MESC sent Tri-County letters advising that the applications had been filed and requested information concerning the layoffs.[3]

Tri-County replied to the MESC regarding Ivan's and Lillian's applications on June 12, and on July 2 as to Croskey's. The replies, identical in content and drafted by accountant/board member Cowen, opposed any award and included as attachments the "reasonable assurance of reemployment" letters given the employees on June 6.

On July 9 the Board named Chuck Hartsell as Tri-County's "Transportation Coordinator." He had been a substitute driver and aide since 1995 and before that had been "in business" for 20 years. His new duties were essentially the same as those of Liedeke and, like him, Hartsell intended to perform them as an adjunct to driving a regular bus route.[4]

On July 13 identical letters to the Charging Parties were prepared over his and Liedeke's signatures. The letters read as follows:

> Please be advised that you are being placed in indefinite layoff from your position with Tri-County Transportation, Inc., effective August 21, l997.
>
> Until further notice, you are not to attend any meetings for Tri-County Transportation, Inc. employees.

At about the same time and responding to a perceived need to run Tri-County on a more business-like basis, Hartsell promptly set to work drafting a 13-page employee handbook the purpose of which, as stated in the preface, was to give employees a greater understanding of what was expected of them on the job. Among other things, the handbook recites: (1) that "all employees are hired for the nine months academic period only. . . . [but are] reasonably assured of returning to work at the beginning of the new school year unless specifically notified to the contrary," (2) that personnel decisions are made without regard to seniority, and (3) that "Any employee (other than the Transportation Coordinator) contacting the Tri-County Bussing or Intermediate School Board of Directors or any individual member of the Boards regarding a work-related issue will be terminated from employment." He issued the handbook to employees on July 31.

On August 14 Hartsell sent the three "indefinite layoff" letters, still dated July 13, to the Charging Parties.[5] Ivan, Croskey, and Lillian then ranked 2d, 12th, and 13th, respectively, in companywide seniority. Among the 12 aides, Lillian ranked third. Tri-County had never before laid off anyone for the regular school term. Nor had layoffs ever before been denominated "indefinite."

The three employees had discipline free employment records.[6] Indeed, board member, Hellenga, specifically includes them in his comment that Tri-County employees love and are loved by the children served.

On September 30, Croskey returned to the Tri-County office and asked Hellenga why he was laid off. According to Croskey's undisputed testimony. Hellenga told him he had no explanation.

Referring to that meeting in a memo to Croskey dated October 14, Hartsell, citing the employee handbook, advised him that "[a]ny further instance of contact with the Board of Directors or individual members of the Board will result in your being discharged."

Three members of the Tri-County board testified. They profess no knowledge of why layoffs were necessary and why the Dicks and Croskey were selected. Petterson states he was away on vacation when the board considered the matter. Cowen recalls that a committee composed of himself, Hartsell, "and maybe someone else" deferred to Hartsell's judgment as to how many and who should be laid off. He adds that Hartsell "probably told me who he was going to lay off. . . . [but] didn't say why." Hellenga disclaims any involvement in the layoff decisions and is "not specifically" aware of reasons therefor.

For his part, Hartsell explains that three layoffs were necessary (1) because, as newly named transportation coordinator, he was entitled to displace a regular driver and (2) because a planned discontinuance of a bus route[7] obviated need for another driver and an aide.

He affirms that the filing of claims for unemployment compensation had nothing to do with his choosing Croskey and the two Dicks for layoff. Instead, and based input from others and on his observations while working as a substitute, he claims that the three had displayed a pattern of "disruptive" behavior and lacked what he views as a necessary requisite for employees in a small company, i.e., an ability to "get along."

In support of that perception, he recites that while riding with Croskey on an empty bus in 1996, he saw him engage in a "dangerous" activity, i.e., drive with a hand throttle engaged.[8] Also, on a number of occasions he heard Croskey gripe about being reassigned by former supervisor, Liedeke, from one route to another with some loss of pay. Further, he observes that Croskey often manifested his displeasure with Liedeke by referring to him as "Adolph" and, when passing, by giving Liedeke what he (Hartsell) perceived to be a nazi salute. Addi-

[3] The three Charging Parties were the only employees who filed for unemployment benefits in 1997 and, except for Croskey, only two other employees (Cynthia Baker and William Dick) had filed in prior years. The circumstances under which they did so (summer layoffs or otherwise) are not of record.

[4] Hartsell testified that on being named coordinator he knew the Charging Parties had filed claims for unemployment compensation and was privy to the letters Tri-County sent to the MESC in opposition to the claims.

[5] Based on my review of the record as a whole, I decline to credit Hartsell's claim the letters were not written until August 13. Among other things, I note cosignatory Liedeke had resigned 3 weeks earlier. However, it appears likely that the effective date was written in on or about August 13.

[6] An exception is a warning issued to Ivan on November 7, 1996, for failing to follow proper procedures in making allegations about another driver (Scott Truesdale).

[7] Discontinuance was at the behest of the ISD financial officer (John Bretschneider) who anticipated "terrific savings" and consequent reduction in Tri-County's per-mile costs.

[8] Hartsell did not caution Croskey or report the incident because as a substitute "if you wanted to work you . . . kept your mouth shut." Also, he feared management "would consider me a trouble maker."

tionally, he faults Croskey for, on a field trip, driving away for a short time after debarking students.[9]

As to the Dicks, Hartsell explains that Liedeke and Cowen told him that they, particularly Ivan, encouraged parents to attend a board meeting in May 1996 to complain about another driver's (Scott Truesdale's) misconduct involving, among other things, drug use and urinating outside a bus in view of children being transported. Also, he considers Lillian a "backbiter" because she told him repeatedly over a 6-week period they rode together in 1996 that Liedeke and other management people were "crooks and thieves . . . [for] stealing" a job from Ivan. Then too, he was apprehensive that Lillian, if retained, would have "worked against us" for laying Ivan off.

Discussion

Newly named supervisor, Hartsell, was aware that among other employees laid off for the summer recess Croskey and the Dicks alone had chosen to file unemployment compensation claims, and this despite common knowledge that Tri-County had in the past and would again[10] oppose such claims. On July 14, 5 days after being appointed, Hartsell reacted by drafting the "indefinite layoff" letters. He had long held the view that the three were troublemakers, i.e., not sufficiently deferential to management; and their act of filing decisively reinforced that perception.

In these circumstances, I view as highly probable, and find, that the "indefinite layoffs" were terminations and were prompted by or at least due in significant part to the filings.

The next question is whether in filing the three employees engaged in "concerted" activity for "mutual aid and protection" and so come within the aegis of Section 7 of the Act.

It is clear that seeking statutorily created employment benefits from a common employer is a legitimate objective for concerted action. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). I find it equally clear that the three employees went to the unemployment office together, not simply to help each other file an application, but concertedly for mutual aid and protection. Again, they were aware that what they were doing would be opposed by their employer and apprehensive as to what else might happen. Accordingly, through their prearranged gathering they sought reassurance from each other's presence, i.e., acted concertedly. In this respect, the situation here differs materially from the hypothetical one considered in *D. A. Collins Refractories*, 272 NLRB 931 fn. 2 (1984).

I conclude that in terminating the three employees Tri-County violated Section 8(a) (1) as alleged.

There remains to be considered the work rule (see item (3) p. 1165, supra) published by Tri-County on or about July 13. That rule is overly broad in that it flatly precludes employees from ever acting concertedly in presenting work-related concerns to higher management officials of Tri-County or to third parties (e.g., ISD). See *Compuware Corp*., 320 NLRB 101 (1995), enfd. 134 F.3d 1285 (6th Cir. 1998), cert. denied 523 U.S. 1123 (1998).

Although the rule is not contained in a revised employee handbook issued April 30, 1998, that circumstance does not negate or ameliorate this violation of employees' Section 7 rights, especially since there is no indication that employees were told that (1) the deletion was made, (2) why it was made, and (3) any disciplines issued thereunder, including Croskey's, were removed from personnel files.

I find promulgation, maintenance, and enforcement of the rule violative of Section 8(a)(1), as alleged.

CONCLUSION OF LAW

The Respondent Tri-County is shown to have violated Section 8(a)(1) of the Act in the particulars and for the reasons stated above, and its violations have affected, and unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent Tri-County has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged three employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Tri-County Transportation, Inc. of Cadillac, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activities, including the filing of claims for unemployment compensation with the Michigan Employment Security Commission.

(b) Promulgating, maintaining, and enforcing a rule precluding employees from acting concertedly in presenting work-related concerns to higher management officials of Tri-County or third parties such as the Intermediate School District.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer John Croskey, Lillian Dick, and Ivan Dick full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make John Croskey, Lillian Dick, and Ivan Dick whole for any loss of earnings and other benefits suffered as a result of the discrimination practiced against them, in the manner set forth in the remedy section of the decision.

[9] On cross-examination, Hartsell concedes that 6 to 8 teachers and aides remained with the 25 children and that he was unaware that Croskey left to refuel the bus.

[10] As noted earlier the "reasonable assurance of reemployment" letter given them and other laid-off employees on June 6 was couched in terms of exclusionary language in the pertinent Michigan unemployment compensation statute.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Within 14 days from the date of this Order, remove from its files any reference to disciplines issued to employees, including John Croskey, for violating a rule prohibiting employees from concertedly presenting work-related concerns to higher management officials of Tri-County or to third parties such as the Intermediate School District and within 3 days thereafter notify the employees in writing that this has been done and that the disciplines will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in Cadillac, Michigan, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 13, 1997.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for acting together for other mutual aid or protection, including concertedly filing claims for unemployment compensation with the Michigan Employment Security Commission.

WE WILL NOT make, maintain, or enforce a rule precluding you from acting concertedly in presenting work-related concerns to higher management officials of Tri-County or third parties such as the Intermediate School District.

WE WILL NOT in any like or related manner interfere, restrain, or coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer John Croskey, Lillian Dick, and Ivan Dick full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make John Croskey, Lillian Dick, and Ivan Dick whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination practiced against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of John Croskey, Lillian Dick, and Ivan Dick, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to disciplines issued to employees, including John Croskey, for violating a rule prohibiting you from concertedly presenting work-related concerns to higher management officials of Tri-County or to third parties such as the Intermediate School District, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the disciplines will not be used against them in any way.

TRI-COUNTY TRANSPORTATION, INC.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."